No. 80-991

In the Supreme Court of the United States

OCTOBER TERM, 1980

BARRY B. GEORGE, PETITIONER

v.

GARY W. KAY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

TABLE OF AUTHORITIES

Page

Cases:

Barr v. *Matteo*, 360 U.S. 564 ..... 2, 3, 4

Berberian v. *Gibney*, 514 F. 2d 790 5

Birnbaum v. *United States*, 588 F. 2d 319 3

Bivens v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, on remand, 456 F. 2d 1339 5

Butz v. *Economou*, 438 U.S. 478 ..... 2, 3, 5

Doe v. *McMillan*, 412 U.S. 306 ..... 3, 4

Evans v. *Wright*, 582 F. 2d 20 3

Ferri v. *Ackerman*, 444 U.S. 193 3

Galella v. *Onassis*, 487 F. 2d 986 5

Granger v. *Marek*, 583 F. 2d 781 ..... 3, 5

Gregoire v. *Biddle*, 177 F. 2d 579, cert. denied, 339 U.S. 949 4

Howard v. Lyons, 360 U.S. 593 2

Miller v. *DeLaune*, 602 F. 2d 198 3

Pierson v. *Ray*, 386 U.S. 547 5

Sami v. *United States*, 617 F. 2d 755 ..... 3, 5

Tigue v. *Swaim*, 585 F. 2d 909 3

Statute and rule:

28 U.S.C. 1442 1

Fed. R. Civ. P. 12(b)(6) 1-2

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-991

BARRY B. GEORGE, PETITIONER

v.

GARY W. KAY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

---

1. Petitioner, an attorney in private practice specializing in automobile accident cases, instituted this common-law defamation suit in state court against respondent, a United States Postal Inspector. Seeking $2 million in damages (Pet. App. A2), petitioner alleged that respondent stated to a third party that petitioner had staged automobile accidents in order to recover on insurance policies (*id.* at A24). This statement was allegedly made during an interview that respondent conducted as part of an investigation into possible mail fraud committed by petitioner (*ibid.*).

After the case was removed to the United States District Court for the District of South Carolina pursuant to 28 U.S.C. 1442, respondent moved to dismiss or, in the alternative, for summary judgment. Both petitioner and respondent filed affidavits in support of their positions (Pet. App. A1-A14). The district court dismissed the case under Fed.

R. Civ. P. 12(b)(6) on the ground that respondent was absolutely immune from damages liability in this common-law tort action because he was a government official acting within the scope of his official authority (Pet. App. A16-A17).

The court of appeals affirmed. It rejected petitioner's argument that the doctrine of official immunity is simply inapplicable to government officials of respondent's rank who exercise discretionary authority (Pet. App. A25-A26). Moreover, contrary to petitioner's contention that respondent should be allowed only the qualified immunity recognized in *Butz* v. *Economou*, 438 U.S. 478 (1978), the court held that "as no constitutional violation has been alleged in the instant case, the district court was correct in allowing [respondent] the *Barr* [v. *Matteo*, 360 U.S. 564 (1959)] absolute privilege rather than the *Butz* qualified privilege" (Pet. App. A28). Because the court of appeals concluded that there was no genuine issue of material fact and that the record showed that respondent was acting within the scope of his duties as a postal inspector when the statements were allegedly made (*id.* at A26-A28), it upheld the judgment of the district court (*id.* at A30).[1]

2. The decision of the court of appeals is correct and does not conflict with any decision of this Court or the other courts of appeals. Accordingly, further review is unwarranted.

a. In *Barr* v. *Matteo*, 360 U.S. 564 (1959), this Court held that federal officials acting within the scope of their official duties are absolutely immune from common-law tort liability. See also *Howard* v. *Lyons*, 360 U.S. 593 (1959). That

---

[1]The court of appeals did find that the district court should have granted respondent's motion for summary judgment rather than the motion to dismiss, since it was unnecessary to examine materials outside the pleadings. However, the court found it necessary to remand for further proceedings because it determined that summary judgment in favor of respondent was proper (Pet. App. A28-A30).

holding was left undisturbed by this Court's decision in *Butz* v. *Economou, supra,* that federal officials sued for constitutional torts are generally entitled to only a qualified immunity. The Court expressly limited its *Economou* ruling to the scope of immunity in the area of constitutional violations. See, *e.g.*, 438 U.S. at 495 & n.22. See also *Ferri* v. *Ackerman*, 444 U.S. 193, 203-204 & n.20 (1979). The courts of appeals have uniformly concluded that the doctrine of absolute immunity in common-law tort suits was not abrogated by *Economou*. See *Miller* v. *DeLaune*, 602 F. 2d 198, 199-200 (9th Cir. 1979); *Sami* v. *United States*, 617 F. 2d 755, 770 (D.C. Cir. 1979); *Granger* v. *Marek*, 583 F. 2d 781, 784 (6th Cir. 1978); *Evans* v. *Wright*, 582 F. 2d 20, 21 (5th Cir. 1978); see also *Birnbaum* v. *United States*, 588 F. 2d 319, 332 (2d Cir. 1978); *Tigue* v. *Swaim*, 585 F. 2d 909, 913 (8th Cir. 1978).

b. Petitioner contends (Pet. 14) that respondent's position as a postal inspector is not of "suitable rank" to be within the doctrine of official immunity. However, as the courts below correctly held, absolute immunity under *Barr* is afforded not only to high-ranking federal officials but also to subordinate officials who exercise discretionary authority. This Court has explained that "[t]he privilege is not a badge or emolument of exalted office, but an expression of a policy designed to aid in the effective functioning of government. * * * It is not the title of his office but the duties with which the particular officer * * * is entrusted" that determine the scope of the immunity. *Barr* v. *Matteo, supra*, 360 U.S. at 572-573.[2]

---

[2]Indeed, following *Barr* v. *Matteo*, the courts of appeals have found many "lower level" federal officials entitled to absolute immunity in common-law tort actions. See cases cited at page 5, *infra*. Nor is *Doe* v. *McMillan*, 412 U.S. 306 (1973), to the contrary, for the discussion in that case upon which petitioner relies (Pet. 9-10) concerned the immunity of the Public Printer and the Superintendent of Documents for

c. Petitioner further suggests (Pet. 11) that respondent "was not acting within the outer perimeters of his official duties" because he was "not authorized to publish charges of criminal activity." However, this argument rests on a mischaracterization of the responsibilities of a postal inspector in investigating the possibility of mail fraud. Without question, respondent was authorized to interview potential witnesses and to inform them of the purpose and basis of the investigation. Respondent did nothing more here, and the statements made during the course of his investigation were clearly within the ambit of his discretionary authority.

Moreover, the fact that respondent's statements were allegedly defamatory does not demonstrate that he acted outside the scope of his authority. See *Barr* v. *Matteo, supra,* 360 U.S. at 575. As Judge Learned Hand observed in *Gregoire* v. *Biddle,* 177 F. 2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950), "[w]hat is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using the power for any of the purposes on whose account it was vested in him."

d. Petitioner finally contends (Pet. 11-13) that a postal inspector, like a police officer, exercises only a limited discretion and therefore should be entitled merely to a qualified immunity. While police officers enjoy only a qualified privilege in common-law tort actions involving allegedly unlaw-

---

nondiscretionary acts (*id.* at 321-323) that were not protected by a derivative immunity under the Speech or Debate Clause (*id.* at 320, 324). Nothing in that case casts doubt on the principles expressed in *Barr* v. *Matteo.*

ful searches and seizures,[3] it has been recognized that they are entitled to an absolute immunity in defamation suits such as the instant case. See, *e.g.*, *Sami* v. *United States*, *supra*, 617 F. 2d at 768-769. Indeed, courts of appeals have consistently found the absolute-immunity rule of *Barr* v. *Matteo* to be applicable in a variety of common-law tort actions involving law enforcement officials performing duties similar to those of respondent. See, *e.g.*, *Granger* v. *Marek*, *supra*, (IRS agents sued for intentional infliction of physicial and emotional distress); *Berberian* v. *Gibney*, 514 F. 2d 790 (1st Cir. 1975) (IRS agents sued for malicious use of process); *Galella* v. *Onassis*, 487 F. 2d 986 (2d Cir. 1973) (Secret Service agents sued for false arrest, malicious prosecution, interference with trade).[4]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

WADE H. MCCREE, JR.
Solicitor General

MARCH 1981

---

[3]See *Pierson* v. *Ray*, 386 U.S. 547 (1967). On remand from this Court in *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), the court of appeals noted that "the fiction that * * * [an arrest] is not discretionary is maintained because of the belief that the benefit to society derived from the protection of personal liberties outweighs the detriments of perhaps deterring vigorous police action." 456 F. 2d 1339, 1346 (2d Cir. 1972).

[4]Although the issue is nowhere discussed in the body of the petition, petitioner asserts in the "Questions Presented" and the "Conclusion" (Pet. 16) that summary judgment was improperly granted because of the existence of disputed factual issues. This fact-bound claim does not warrant further review. At all events, the court of appeals correctly found (Pet. App. A30) that, even accepting the truth of petitioner's factual submissions, the record presented no genuine issue of material fact and respondent was entitled to judgment as a matter of law on the ground of absolute immunity. See *Granger* v. *Marek*, *supra*, 583 F. 2d at 786; see also *Butz* v. *Economou*, *supra*, 438 U.S. at 507-508.